Supreme Court, U.S.
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No. 91-2066

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CITY OF CHANUTE, KANSAS, *et al.*,
Petitioners,

v.

WILLIAMS NATURAL GAS COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the court of appeals correctly held that the provision of regulated natural gas sales and transportation service by the Respondent to Petitioners defeats their claims under the "essential facilities" doctrine of Sherman Act § 2, and whether that holding is fully consistent with prior opinions of this Court and the other courts of appeals.

II. Whether this Court should deny certiorari on the Petitioners' "tying" claim under Sherman Act § 1 since the undisputed facts presented below demonstrate that they cannot prove at least one element of that claim.

III. Whether the court of appeals correctly concluded that Respondent's efforts to avoid millions of dollars in contract liability constitutes a legitimate business reason for the conduct sued upon, and whether that conclusion is fully consistent with prior decisions of this Court.

IV. Whether the issues raised in the petition for writ of certiorari are not sufficiently important for this Court's review because they will not likely be repeated, thereby making further adjudication in this case important only to the parties and not to the general public.

RULE 29.1 LISTING

Respondent Williams Natural Gas Company is a wholly-owned subsidiary of The Williams Companies, Inc. Other subsidiaries of The Williams Companies, Inc. which are not wholly-owned by that corporation are as follows:

Apco Argentina, Inc.

Kern River Gas Supply Corporation

Kern River Service Corporation

Kern River Gas Transmission Company

Texasgulf, Inc.

Interconnect Acquisition Corporation

Facilities Communications International

Northern Border Pipeline Company

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Williams Natural Gas Company ("WNG"), respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the opinion of the United States Court of Appeals for the Tenth Circuit in this case. The opinion below is published at 955 F.2d 641 (10th Cir. 1992).

AUTHORITIES INVOLVED

Petitioner omitted the following statutory provisions involved in this proceeding:

Section 4 of the Natural Gas Act, 15 U.S.C. § 717c, provides in pertinent part as follows:

> (c) . . . [E]very natural-gas company shall file with the [Federal Energy Regulatory] Commission . . . schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

Section 7 of the Natural Gas Act, 15 U.S.C. § 717f, provides in pertinent part as follows:

> (b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission . . . .
>
> (c) No natural-gas company . . . shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, . . . unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: . . . .

Section 311 of the Natural Gas Policy Act of 1978, 15 U.S.C. § 3371, provides in pertinent part as follows:

(a) . . . (1) . . . (A) In general.—The Commission may, by rule or order, authorize any interstate pipeline to transport natural gas on behalf of—

(i) any intrastate pipeline; and

(ii) any local distribution company.

STATEMENT OF THE CASE

Aside from the gross overstatement of the import of the Court of Appeals' ruling as a "sweeping immunization" from the antitrust laws for the interstate natural gas pipeline industry, the principal flaw in the Cities'[1] petition is that it wholly ignores the business and regulatory context of WNG's actions. The Cities acknowledge the existence of the pervasive regulatory regime in which WNG must operate its business, but dismiss it nonchalantly by stating that "[t]his case involves, but is not constrained by, the relationship between the antitrust laws and a federally regulated industry." (Petition at 4).

WNG has never advocated in this case that the regulatory regime under the Natural Gas Act ("NGA") and the Natural Gas Policy Act of 1978 ("NGPA") "immunizes" WNG from the antitrust laws, as the Cities so often repeat, nor has any court so held. (*See* 955 F.2d at 656, Petition App. 24a). What WNG has advocated is that the federal regulatory regime is an integral part of the market conditions of the interstate natural gas industry and, as a result, this case must be judged against the backdrop of federal regulation and its effect on both WNG's and the Cities' behavior.[2] The law requires precisely such an analysis. *See United States v.*

[1] The Petitioners will be referred to herein collectively as "the Cities."

[2] The Cities actually admit the close interplay of the antitrust laws and the federal regulatory scheme for interstate natural gas pipelines by their acknowledgement that when the regulatory process at issue in this case was complete and WNG became a certificated open-access transporter under § 7 of the NGA, the preliminary injunction they had obtained under the antitrust laws (and which was stayed by the Tenth Circuit) became "moot." (Petition at 10).

Marine Bancorporation, 418 U.S. 602, 627 (1975); *Silver v. New York Stock Exchange*, 373 U.S. 341, 360-61 (1963); *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1105-06 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983).

> The more general point is that antitrust courts can and do consider the particular circumstances of an industry and therefore adjust their usual rules to the existence, extent, and nature of regulation. Just as the administrative agency must consider the competitive premises of the antitrust laws, the antitrust court must consider the peculiarities of an industry as recognized in a regulatory statute.

1 Areeda, Turner, *Antitrust Law* § 223d (1978).

The lower courts followed that law in this case, as did the courts in *State of Illinois v. Panhandle Eastern Pipe Line Co.*, 730 F. Supp. 826 (C.D. Ill. 1990), *aff'd*, 935 F.2d 1469 (7th Cir. 1991), *cert. denied*, —— U.S. —— (1992), an analogous antitrust case brought against an interstate natural gas pipeline in nearly identical regulatory and business circumstances. Properly viewed, therefore, the lower court decisions are entirely correct and fully consistent with all apposite prior decisions, and the Cities present no issue worthy of this Court's limited time and resources.

Regulatory and Historical Background

Like virtually all interstate natural gas pipelines, WNG has through most of its history purchased natural gas at the wellhead and transmitted the gas to markets where the gas was resold, mostly to local distribution companies ("LDCs") who in turn resold it to residential and industrial end users. In this so-called "merchant function," the pipeline was principally a seller, not a transporter, of the gas. There was virtually no demand for transportation service by itself before the mid-1980s, and few pipelines even had general application rate schedules providing for such service.[3]

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[3] The background of the interstate natural gas industry has been the subject of many judicial decisions, and the Court is referred to

Commencing with the passage of the NGA in 1938, 15 U.S.C. § 717 *et seq.*, virtually every aspect of an interstate pipeline's business, from the original purchase price paid to the producer to the end-product sale price to the LDC, including commencement and termination of service and the terms and conditions of the service provided, was closely regulated—first by the Federal Power Commission ("FPC") and later by the Federal Energy Regulatory Commission ("FERC"). Under the NGA, each and every transaction for the transportation or sale of gas for resale required the pipeline to obtain a certificate of public convenience and necessity from the FPC or FERC. NGA § 7, 15 U.S.C. § 717f. The NGA also prohibits pipelines from unduly discriminating among customers in the price or terms of service. NGA § 4, 15 U.S.C. § 717c.

This system of regulation worked fairly well for several decades and resulted in nationwide expansion of the availability of natural gas to consumers at low prices relative to the cost of competing fuels. But by the early 1970s it became clear that the artifically low wellhead price limits imposed by FPC regulation were inhibiting the production of sufficient volumes of gas to meet rising demand, and a severe national shortage of gas deliverability to the interstate market developed in the 1970s and early 1980s.[4]

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the excellent discussions in the following cases: *Mobil Oil Exploration & Producing Southeast, Inc. v. United Distribution Cos.*, — U.S. —, 111 S. Ct. 615 (1991); *Associated Gas Distributors v. FERC*, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988); *State of Illinois v. Panhandle Eastern Pipe Line Co.*, 730 F. Supp. 826 (C.D. Ill. 1990), *aff'd*, 935 F.2d 1469 (7th Cir. 1991), *cert. denied*, — U.S. — (1992).

[4] The FPC began regulating the price charged by producers at the wellhead after this Court's decision in *Phillips Petroleum Co. v. State of Wisconsin*, 347 U.S. 672 (1954). Traditionally, the interstate wellhead price set by the FPC was cost-based, not market-based, and consequently was below the price that *intrastate* pipelines and other unregulated purchasers were able to offer, thereby resulting in short supplies to consumers served by *interstate* pipelines. *See Mobil Oil Exploration & Producing Southeast, Inc. v.*

The shortage created intense competition for wellhead purchases of gas, but the price of gas to the interstate market was still regulated by the FPC, thus eliminating price as a bargaining point. Instead, producers began demanding, and pipelines were forced to accept, onerous non-price contract terms—long contract commitments, as long as twenty years, and high take-or-pay provisions requiring the pipeline to purchase or pay for as much as 95 to 100 percent of a well's annual deliverability.[5]

In an effort to eliminate the deliverability shortage, in 1978 Congress enacted the NGPA, which phased-in deregulation of wellhead purchases of natural gas. 15 U.S.C. § 3301 *et seq.* The NGPA established price ceilings for various categories of new natural gas production which were significantly higher than previous regulated rates, and because producers were still in a vastly superior bargaining position over interstate pipelines, in most cases the NGPA's ceilings ended up being the contract price for gas covered by the NGPA. The net result was that by 1982, WNG, like most interstate pipelines, was committed under a significant number of 20-year gas purchase contracts with high prices and high take-or-pay requirements.

In time, the NGPA accomplished its purpose and substantial new reserves were committed to the interstate gas market, albeit at significantly higher prices. In 1984 and 1985, however, demand for natural gas began a precipitous decline due to a combination of causes, including the NGPA-induced higher prices, political events in the Middle East resulting in a sharp drop in the price

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United Distribution Cos., — U.S. —, 111 S. Ct. 615, 619-620 (1991); *Blanco Oil Co. v. FERC*, 598 F.2d 152, 155 (D.C. Cir. 1979).

[5] A take-or-pay provision in a contract requires a purchaser to pay for a stated quantity of gas whether or not that gas is actually purchased. *See Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd. of Mississippi*, 474 U.S. 409, 412 (1986); *Kaiser-Francis Oil Co. v. Producer's Gas Co.*, 870 F.2d 563, 565-66 (10th Cir. 1989); *Universal Resources Corp. v. Panhandle Eastern Pipe Line Co.*, 813 F.2d 77, 80 (5th Cir. 1987).

of competing supplies of oil, and the general economic recession. Consequently, the gas shortages of the 1970s became a gas deliverability glut in the 1980s as supplies came to greatly exceed demand. Once again, however, the interstate gas market was grossly distorted because so much of pipelines' supply reserves were committed under long-term, high-priced, take-or-pay contracts.

In response to this crisis the FERC began a checkered series of initiatives, many of which were reversed or remanded by the courts of appeals, which created an ever-changing regulatory landscape through which interstate pipelines like WNG were required to navigate. First, the FERC implemented "special marketing programs" designed to move lower-cost excess deliverability to those customers most likely to switch to alternative fuels at competitive prices, usually industrial end-users, but these programs were reversed in *Maryland People's Counsel v. FERC*, 761 F.2d 768 (D.C. Cir. 1985), 761 F.2d 780 (D.C. Cir. 1985), and 768 F.2d 450 (D.C. Cir. 1985).

In response to the legal demise of the special marketing programs, the FERC next proposed to radically alter interstate pipelines' historical role as merchants of gas to make them primarily gas transporters by a new "open-access" regulatory initiative announced in FERC Order No. 436, 50 Fed. Reg. 42,408 (1985).

> Order [No. 436] envisages a complete restructuring of the natural gas industry. It may well come to rank with the three great regulatory milestones of the industry: the passage of the Natural Gas Act in 1938, the imposition of price controls on independent producers' wellhead sales under *Phillips Petroleum Co. v. Wisconsin*, and adoption of the Natural Gas Policy Act in 1978.

Associated Gas Distributors v. FERC, 824 F.2d 981, 993 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988) (citations omitted) (hereinafter "*AGD*"). Order No. 436 and the regulations it put in place permit interstate pipelines which voluntarily offer transportation services to

obtain a "blanket certificate" under NGA § 7 permitting the provision of transportation without individual FERC approval, but only on a non-discriminatory, system-wide basis. 18 C.F.R. §§ 284.8, 284.9. As the court noted in *AGD*, however, when the FERC took this monumental step, it largely ignored the baggage hanging over from an earlier era—the billions of dollars in take-or-pay exposure the pipelines faced if they suddenly were no longer selling (and hence not buying) gas. *AGD*, 824 F.2d at 1021-30.

Although *AGD* largely affirmed the basic transportation program adopted in Order No. 436, it reversed significant portions of the order because of the FERC's failure to come to grips with the industry's serious take-or-pay problems. That reversal resulted in FERC Order No. 500, 52 Fed. Reg. 30,334 (1987), which addressed some of the take-or-pay concerns on an interim basis, but it too was remanded for the FERC to reconsider various aspects of the order, including take-or-pay. *American Gas Ass'n v. FERC*, 888 F.2d 136 (D.C. Cir. 1989).

During the pendency of its Order Nos. 436 and 500 transportation initiatives, the FERC also promulgated Order No. 451, 51 Fed. Reg. 22,168 (1986), purportedly to increase the supply of spot market gas available for sale to LDCs like the Cities. That order established a so-called "good faith negotiation" procedure which allowed producers of lower-priced, pre-NGPA gas to demand that pipelines renegotiate the price in those older contracts upward to a much higher ceiling price. 18 C.F.R. § 270.201. If the pipeline did not agree to pay the higher price, the producer could elect to consider the gas abandoned and could sell it elsewhere. Since the ceiling price, and therefore the price usually demanded under the "good faith negotiation" procedure, was much higher than market rates, the effect of Order No. 451 was to cause pipelines to lose a significant volume of low-priced gas which they had been using to moderate the expensive post-NGPA gas they were required to purchase or pay for

under take-or-pay contracts in arriving at a lower weighted average cost of gas to consumers.

In addition, if a pipeline was not an open-access transporter under an NGA § 7 certificate when gas was abandoned under FERC Order No. 451, the order required the producer to provide a right of first refusal to all the firm sales customers of the pipeline (including the Cities) before selling it to a new purchaser. Order No. 451 also required the pipeline to transport the gas to any buyer also a firm sales customer of the pipeline. 18 C.F.R. §§ 270.201(g) and (h). After Order No. 451 was in effect for more than three years, and many pipelines including WNG had attempted to reorder their affairs accordingly, it was reversed in *Mobil Oil Exploration & Producing Southeast, Inc. v. FERC*, 885 F.2d 209 (5th Cir. 1989), but later reinstated by this Court. *Mobil Oil Exploration & Producing Southeast, Inc. v. United Distribution Cos.*, —— U.S. ——, 111 S. Ct. 615 (1991).

Throughout this regulatory disarray, the FERC consistently paid little or no attention to the fall-out remaining after the gas deliverability shortage was long gone—the mounting take-or-pay problems confronting the entire industry. *See AGD, supra; Mobil, supra; Consolidated Edison Co. of New York, Inc. v. FERC*, 823 F.2d 630 (D.C. Cir. 1987).

The Events Leading Up to This Case

The Cities had been full-requirements customers of WNG since as early as 1947. (*See* 743 F. Supp. at 1451, Petition App. 60a). From its commencement, WNG's sale for resale service to the Cities was governed not only by the requirements contracts between the parties, but also by the NGA § 7 certificates of public convenience and necessity issued by the FPC authorizing that service, and by WNG's FPC/FERC-approved tariff, which was expressly incorporated into the contracts. Under the tariff, the contracts automatically renewed every five years unless either party gave written notice of termination in the manner provided in the tariff. (*See* 1990-91 Trade Cas.

¶ 68,967 at 63,196, Petition App. 95a). The contracts, certificates and tariff required WNG to supply, and the Cities to purchase, the entire gas supply requirements of the Cities' distribution systems.[6] (*See* 678 F. Supp. at 1519, Petition App. 126a). This mode of service governed WNG's relationship with the Cities, and indeed with most of WNG's customers, until 1987-88.

After the promulgation of FERC Order No. 436, WNG promptly initiated the complicated and difficult process of converting its operations from those primarily of a gas merchant to a combination gas merchant and transporter. On July 18, 1986, WNG filed a Stipulation and Agreement ("S&A") at the FERC which had been negotiated with WNG's major customers, potential shippers, state regulatory commissions, and the FERC staff, thus beginning the regulatory procedure to obtain approval of an Order No. 436 blanket certificate for "permanent" open-access transportation operations pursuant to NGA § 7. (*See* 743 F. Supp. at 1452, Petition App. 63a.). The S&A would have permitted WNG's customers to begin receiving transportation service on a phased-in basis, as was contemplated in Order No. 436, and would have provided mechanisms to ameliorate the take-or-pay impact on WNG and its customers.

Anticipating that regulatory approval of the S&A would not be long in coming, WNG initiated an "interim" open-access program on December 23, 1986, pursuant to § 311 of the NGPA, 15 U.S.C. § 3371.[7] (*See* 1990-91

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[6] The Cities' contracts and WNG's tariff also permitted the Cities to purchase a limited amount of "local gas," and a few of the Cities took advantage of that option. (*See* 1990-91 Trade Cas. ¶ 68,967 at 63,197, Petition App. 98a).

[7] NGPA § 311 permits the FERC to authorize interstate pipelines to provide transportation service on behalf of an intrastate pipeline or local distribution company without the need of a certificate issued by FERC under the NGA. 15 U.S.C. § 3371. Section 311 transportation is self-implementing and allows the pipeline to begin and end the transportation without prior FERC approval. After

Trade Cas. ¶ 68,967 at 63,198, Petition App. 100a). To permit the Cities and other customers to purchase gas from third parties, WNG temporarily waived its sales customers' contractual purchase obligations during the interim program, and obtained from the FERC a temporary waiver of the corresponding requirements provision in its FERC Tariff. 36 F.E.R.C. (CCH) ¶ 61,371 (1986). Those waivers temporarily relieved the Cities of the obligation to purchase any portion of their requirements from WNG, but did not relieve WNG of the obligation to stand ready to serve the Cities' full requirements on demand, nor did it provide any take-or-pay protection to WNG. The Cities, like all customers, shippers, and producers on WNG's system, were informed that the interim program and WNG's voluntary waiver of customer purchase obligations would continue only until May 1, 1987. (*See* 1990-91 Trade Cas. ¶ 68,967 at 63,198, Petition App. 100a).

The FERC approved the S&A in February, 1987, but with significant modifications which eliminated much of the take-or-pay protection built into it. *Northwest Central Pipeline Corp.*, 38 F.E.R.C. (CCH) ¶¶ 61,215; 61,169; 61,170; 61,171 (1987).[8] Because implementing open-access under the FERC-modified S&A would have presented an unacceptable risk of take-or-pay exposure, WNG declined to accept the certificate. (*See* 743 F. Supp. at 1453, Petition App. 63a-64a). Nevertheless, WNG continued with the interim open-access program and immediately began negotiating a Revised Stipulation and Agreement ("RS&A") in the Spring of 1987. (*See* 743 F. Supp. at 1456, Petition App. 70a-71a). During the interim program, as more and more sales customers replaced gas purchased from

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Order No. 436, section 311 transportation had to be "open-access" and could be provided or terminated only in a system-wide manner. *ANR Pipeline Co.*, 39 F.E.R.C. (CCH) ¶ 61,341 (1987).

[8] WNG was formerly named Northwest Central Pipeline Corporation, and before that, Cities Service Gas Company. The abbreviation "WNG" is intended to mean the company under any of these names.

WNG with cheaper gas transported by WNG but purchased from third parties, WNG experienced increasing difficulties in managing its own purchases to satisfy the take-or-pay purchase obligations in gas supply contracts with producers. (*See* 743 F. Supp. at 1453, Petition App. 64a).

By obtaining short-term waivers of take-or-pay liability from its principal supplier, WNG was able to extend the interim program until August 1, 1987, and likewise extended the temporary waiver of the Cities' and other customers' contractual purchase obligations. (*See* 743 F. Supp. at 1453, Petition App. 64a). However, two important take-or-pay considerations became apparent to WNG in late July, 1987—(1) the regulatory approval process for permanent open-access transportation operations under a blanket NGA § 7 certificate, on terms which meaningfully addressed WNG's take-or-pay exposure, was going slower than anticipated, and (2) WNG's principal supplier would not agree to further short-term take-or-pay waivers, without which WNG estimated its take-or-pay exposure could surpass $100 million if the interim program continued another year. (*See* 743 F. Supp. at 1454, Petition App. 67a-68a).

On August 1, 1987, after due notice to all customers, including the Cities, the interim open-access program ended and the requirements provisions of WNG's contracts with the Cities again became operative. (*See* 1990-91 Trade Cas. ¶ 68,967 at 63,197-200, Petition App. 100a-107a). Almost one year later, FERC approved the RS&A by a final order issued on July 5, 1988, 43 F.E.R.C. (CCH) ¶ 61,227 (1988), and accepted WNG's revised tariff on July 19, 1988, 44 F.E.R.C. (CCH) ¶ 61,145 (1988). On the following day, WNG accepted the NGA § 7 blanket certificate and began providing open-access transportation thereunder. (*See* 1990-91 Trade Cas. ¶ 68,967 at 63,195, Petition App. 93a). The Cities began taking all of their gas requirements from third parties on August 5, 1988. (*See* 1990-91 Trade Cas. ¶ 68,967 at 63,195, Petition App. 94a). During the approximately one-year "closed" period

that WNG did not offer open-access transportation (August 1, 1987 to July 20, 1988), three of the Cities (Osage City, Iola, and Auburn) were fully obligated by contract to purchase from WNG all of their gas requirements, except for the gas they purchased from Order No. 451 gas suppliers, and three other Cities (Chanute, Humboldt, and Neodesha) were so obligated until April 22, 1988. (*See* 1990-91 Trade Cas. ¶ 68,967 at 63,196, Petition App. 95a).

As firm sales customers of WNG, the Cities received numerous offers to sell gas from Order No. 451 producers under the FERC's regulations which provided the Cities and other firm sales customers with a right of first refusal to purchase the gas. (*See* 1990-91 Trade Cas. ¶ 68,967 at 68,204-05, Petition App. 119a-120a). During the one-year "closed" period more than 43 trillion cubic feet of Order No. 451 gas flowed on WNG's system in packages as small as 1300 MMBtu per month. In addition several of the many buyers of that gas were small municipal LCDs like the Cities. The Cities' gas consultant advised them in March, 1988, that he and another supplier could put together "an excellent 451 package." (*See* 1990-91 Trade Cas. ¶ 68,967 at 63,205, Petition App. 120a). Indeed, those two suppliers actually bought Order No. 451 gas and resold it to other customers on WNG's pipeline system in May, June, and July, 1988. (*See* 1990-91 Trade Cas. ¶ 68,967 at 63,205, Petition App. 120a).

Notwithstanding this opportunity to obtain gas from third parties and have WNG transport the gas to them at a total delivered price lower than WNG's sales rates, the Cities did not respond to any of the Order No. 451 offers, including their own consultant's. Instead, as the minutes from two Auburn City Council meetings reflect, the Cities as a group made a conscious decision not to purchase Order No. 451 gas because doing so "might be detrimental to our law suite [sic]." (*See* 1990-91 Trade Cas. ¶ 68,967 at 63,205, Petition App. 121a).

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT BETWEEN DECISIONS OF THIS COURT OR THE OTHER COURTS OF APPEALS AND THE TENTH CIRCUIT'S AFFIRMATION OF SUMMARY JUDGMENT AGAINST THE CITIES' SHERMAN ACT § 2 CLAIM UNDER THE "ESSENTIAL FACILITIES" DOCTRINE

The Cities attempt to revive their claim for monopolization in violation of Sherman Act § 2 under the "essential facilities" doctrine by arguing that the court of appeals' decision conflicts with two decisions of this Court and one court of appeals decision: *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 472 U.S. 585 (1985); *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); and *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983). There is no conflict, however, between those cases and the lower court decisions in this case, for the Cities' essential facilities claims is fatally defective for several reasons.

The largest flaw in the Cities' argument is their failure to recognize a fundamental distinction between this case and *Aspen*, *Otter Tail*, and *MCI*. In each of those cases the defendant's conduct completely excluded the plaintiff from the market in which they competed. In *Aspen* the foreclosed market was the market for multi-mountain ski tickets; in *Otter Tail* it was retail electric power; and in *MCI* it was long-distance telephone service. Here, however, the competition the Cities claim existed between them and WNG (but which WNG has always disputed) was in the market for retail sales of natural gas, a market which was absolutely unaffected during the one-year "closed" period because the Cities served their retail customers without any interruption whatsoever.[9] As the Cities

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[9] The Cities state for the first time, albeit in only one conclusory sentence, that they compete with WNG for the *purchase* of natural gas. WNG questions whether "the purchase of natural gas" does, or even could, constitute a distinct market, but in any event the

themselves note, if anyone was excluded from a market by WNG's actions, it was wholesalers of gas, not retail distributors. (Petition at 16). Thus, because the three cases on which the Cities rely are inapposite to the present case, they are not in conflict with the court of appeals' decision.

Just as importantly, the Cities cannot satisfy the required elements of their claim. This Court has not discussed the essential facilities doctrine since the decision in *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912).[10] Over the years since that decision, however, the lower courts have developed four elements for the claim, which are accurately stated in the Cities' petition. (Petition at 14). WNG was entitled to summary judgment because the Cities did not present sufficient evidence on two of those elements: whether WNG denied them access to the facility (*i.e.*, the pipeline), and whether they could duplicate the pipeline, at least in an economic sense, by availing themselves of the abundant supplies of Order No. 451 gas during the one year "closed" period.[11]

Cities never raised that issue below and presented absolutely no evidence of any such supposed market. As a result, this Court should not consider it here, for the Cities' failure to present evidence of this late-claimed market cannot negate WNG's entitlement to summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 321-22 (1986).

[10] The Cities characterize this Court's decisions in *Aspen* and *Otter Tail* as "leading essential facilities cases," but in fact the Court did not discuss the doctrine in either of those cases, and instead conducted traditional monopoly analyses in both.

[11] Curiously, the Cities raise only the first of these two elements in their petition, even though the district court granted, and the court of appeals affirmed, summary judgment for WNG on the absence of both elements. (*See* 955 F.2d at 648-49, Petition App. 8a-9a). That fact alone counsels against granting certiorari, since even if the Cities prevail on the first element, they still cannot succeed on their essential facilities claim because of their failure to present the second ground for summary judgment to this Court, thereby making the court of appeals' decision final and unassailable.

The Cities contend that they were entirely denied access to WNG's "essential facility" because they did not have access to the supplier of their choice. But that simply is not the law. When the law of essential facilities was first stated in the *Terminal R.R.* case, this Court held that the law only requires the putative monopolist to provide access on reasonable terms and conditions. 224 U.S. at 411. The Cities do not dispute that WNG continued to supply all the gas the Cities required to operate their distribution systems throughout the suspension of open-access. (*See* 955 F.2d at 648, Petition App. 7a). Since the rates and terms of WNG's sales service are regulated and approved by the FERC, they are conclusively presumed to be "just and reasonable." *Montana-Dakota Utilities Co. v. Northwestern Public Service Co., Inc.*, 341 U.S. 246 (1951). Therefore, by providing access to the pipeline by way of its own sales service, WNG provided the Cities with just and resonable access to WNG's alleged "essential facility" and could not be liable for the antitrust violation claimed.

The Cities rely primarily on *Otter Tail*, arguing that the Court found a violation of § 2 on the independent basis of Otter Tail's refusal to "wheel" electricity (the electrical equivalent to gas transportation) to municipal electric companies within its territory. But that argument grossly misrepresents the facts and the holding in *Otter Tail*. There the private utility had refused to wheel *or* to sell wholesale power, thus leaving the municipal utilities with no source of electrical power unless they generated it themselves.[12] The Court held that Otter Tail violated the statute by its "refusals to sell at wholesale *or* to wheel. . . ." 410 U.S. at 378 (emphasis added). Thus, it was

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[12] The Cities blatantly misstate the facts of *Otter Tail* when they contend "WNG's offer of its own gas, when its customers wanted access to the pipeline, was equivalent to Otter Tail Power Company's *offer to sell its own electricity*. . . ." (Petition at 16, emphasis added). The true facts are clear from this Court's opinion: "Otter Tail *refused to sell* the new systems energy at wholesale and refused to agree to wheel power from other suppliers of wholesale energy." 410 U.S. at 371 (emphasis added).

Otter Tail's complete refusal to deal with the municipal utilities which constituted the violation, not (as here) simply a temporary one-year unavailability of precisely the service the Cities desired.

The holding of *Otter Tail* is entirely consistent with the purpose behind the doctrine of allowing competition to occur when one competitor enjoys exclusive control over access either to the product its competitors need to compete *e.g.*, *City of Chanute v. Kansas Gas & Electric Co.*, 754 F.2d 310 (10th Cir. 1985), or access to the customers themselves. *E.g.*, *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509 (10th Cir. 1984), *aff'd*, 472 U.S. 585 (1985). If Otter Tail had supplied the municipalities with wholesale electric power, they would have been able to provide electric service to their customers. The same is true in this case: by supplying gas to the Cities via its regulated sales service, WNG allowed the Cities to obtain the product they needed to service their customers, *i.e.*, they had access to the facility. It is clear, then, that the Cities were not denied the ability to compete and their real complaint is only that they could have earned more profit if they had been able to obtain cheaper supplies. Therefore, since the Cities had access to WNG's sales gas, they had access to the pipeline and can prove no violation of the essential facilities doctrine.

Even if providing WNG's sales service cannot be considered reasonable access to WNG's pipeline, both lower courts also found in the alternative that the availability of large volumes of gas released under FERC Order No. 451, which FERC regulations required WNG to transport even during the "closed" period, constituted reasonable access to the pipeline. The Cities largely ignore this holding, thereby providing another reason for this Court to deny certiorari. (*See* footnote 11, *supra*). Even so, the existence and availability of Order No. 451 gas provide ample reason for the Court to deny the writ on the merits. The Cities' sole argument against this proposition is that the Order No. 451 gas was "only offered on a 'take it or leave it' basis, in packages too large for Cities to accept."

(Petition at 16 n.7). But the undisputed facts borne out by the evidence presented below simply do not support that statement. See pages 7-8, 12, *supra*.

The district court found, and the court of appeals affirmed, that the undisputed evidence of the availability of transportation for Order No. 451 gas to the Cities throughout the "closed" period conclusively shows that the Cities cannot prove they were denied access to WNG's system, even for the transportation of third-party gas. Far from being inconsistent with *Otter Tail*, that holding is fully in line with the *Otter Tail* result. In *Otter Tail*, the putative monopolist refused to provide either wholesale sales service or transportation of power generated by third parties. Here, WNG did both, thereby justifying a different result than in *Otter Tail*. Hence, the Cities present no reason for granting their petition based on some supposed inconsistency with *Otter Tail*.

Similarly, the decisions below are not inconsistent with either *Aspen* or *MCI*, and it is difficult to determine precisely what conflict the Cities attempt to show in their petition between those cases and this one. Apparently, the conflict the Cities perceive with *MCI* is that the Seventh Circuit found that federal regulation did not exempt AT&T's conduct from the antitrust laws. But clearly there is no conflict on that ground, for the lower courts in this case did not find WNG's conduct immune or exempt from the antitrust laws. Moreover, in the *MCI* case (as in *Otter Tail*) the defendant had denied all access by preventing any interconnection by MCI with local interchange carriers. 708 F.2d at 1132-33. As noted above, WNG did not preclude the Cities from any market.

The Cities' point with regard to *Aspen* is even more obscure. The Cities seem to argue this Court held in *Aspen* that the failure to provide precisely the access the plaintiff wants constitutes a denial of access to an essential facility. That argument does not present a conflict for this Court's resolution for the obvious reason that there is no such holding in *Aspen*. In fact, the Court did not even consider the essential facilities doctrine in *Aspen*.

Rather, the fact that the defendant had offered to allow the plaintiff to participate in the multi-mountain ski pass only on condition that it accept a substantially reduced share of revenue was but one of a host of actions the Court considered in determining that a jury's verdict finding the defendant's conduct lacked a business justification was supported by sufficient evidence. *Aspen*, 472 U.S. at 605-611. Nothing in the Court's opinion indicates that that fact, if it stood alone, would be sufficient to establish an essential facilities-based violation of § 2.

At bottom, though the Cities have characterized their reason for granting the writ as some supposed conflict between the decisions below and the decisions in *Otter Tail*, *Aspen*, and *MCI*, it is clear that no such conflict exists. The conduct condemned in those cases was far different than in the present case—in each the defendant had completely excluded the plaintiff from the market in which they competed. Here, even if there is competition for gas sales between WNG and the Cities, WNG did not exclude the Cities from that market. Thus, not only is there no conflict with the cases the Cities cite, there is no violation of the "essential facilities" doctrine whatsoever, and the courts below were correct in granting and affirming summary judgment against the Cities' claim.

II. CERTIORARI ON THE CITIES' "TYING" CLAIM SHOULD BE DENIED BECAUSE THEY FAILED TO DEMONSTRATE A DISPUTED ISSUE OF FACT ON THE ABSENCE OF A REQUIRED ELEMENT OF A TYING VIOLATION OF SHERMAN ACT § 1

WNG acknowledges that the concerted action requirement of § 1 in a claim for illegal tying can be found in an agreement between the plaintiff and defendant. Neither party raised that issue on summary judgment; instead, the district judge reached the holding that no concerted action was present here *sua sponte*, and the court of appeals simply affirmed it. Moreover, whether or not there was concerted action in this case, the Cities still cannot

succeed on their tying claim because of the alternative ground for summary judgment found by the district court and endorsed by Judge Seymour's concurring opinion for the Tenth Circuit—the Cities were not *forced* to purchase WNG's sales gas. (*See* 955 F.2d 658-59, Petition App. at 30a-32a (Seymour, J., concurring)).

The gist of the Cities' tying claim was that WNG had tied its transportation service to its sales gas, thus forcing customers to accept WNG's own sales gas to obtain transportation service. The undisputed evidence below, however, demonstrates that WNG was not only willing to provide transportation without its sales service, WNG was compelled to do so by FERC Order No. 451, and, in fact, did so during the "closed" period. 18 C.F.R. § 284.201. This Court made clear in *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984), that no violation of § 1 occurs in the absence of a forced purchase of a second product.

> Our cases have concluded that the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product *to force the buyer into the purchase of a tied product* that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.
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> * * * *
>
> *When "forcing" occurs*, our cases have found the tying arrangement to be unlawful.

466 U.S. at 12, 14 (emphasis added). That element is not satisfied here because of the availability of FERC Order No. 451 gas.

WNG has already demonstrated at length the availability of Order No. 451 gas as an alternative to WNG's gas sales. The district court clearly found that the lack of forcing warranted summary judgment for WNG, and it was on this basis that Judge Seymour would have affirmed the district court holding. (*See* 955 F.2d at 659, Petition App. at 32a). The Cities virtually ignore this

independent basis for affirming the district court, relegating the whole issue to a footnote in which they say that the district court's holding and Judge Seymour's concurring opinion are "not dispositive" because "WNG had monopoly power." (Petition at 20 n.14). Clearly, however, whether WNG possessed monopoly power is irrelevant if, in fact, WNG did not require the purchase of two products together. Here, WNG did not—transportation service alone was available for the transportation of Order No. 451 gas which the Cities deliberately avoided. Therefore, the Cities cannot prove that WNG forced the Cities to purchase its sales gas, and their tying claim must fail. For that reason alone, the Court should deny the Cities' petition for certiorari to review the court of appeals' affirmance of summary judgment against the Cities' tying claim.

III. THE ONLY EVIDENCE IN THE RECORD IS THAT WNG'S ACTIONS WERE JUSTIFIED BY LEGITIMATE BUSINESS REASONS WARRANTING SUMMARY JUDGMENT FOR WNG, THUS ELIMINATING ANY GROUND FOR THIS COURT'S REVIEW

The Cities' final proposition, that the court of appeals erred in affirming summary judgment against their "general monopolization" claim, is really directed at three issues: (1) whether WNG's conduct was motivated by legitimate business justifications, (2) whether some of the Cities lack standing to assert all or part of their claims, and (3) whether the Cities had failed to present evidence of an effect on competition. As Judge Seymour noted in concurring, the last two of these are irrelevant and need not be addressed at all since the district court was correct in ruling in WNG's favor on the first. Even so, the Cities cannot prevail on any of the three issues.

A. There Were Legitimate Business Reasons for WNG's Actions

The district court found that, in the context of the regulatory turmoil then extant in the natural gas industry, WNG's suspension of open-access was justified by the legitimate business purpose of avoiding exposure to mil-

lions of dollars, in take-or-pay exposure which was likely to occur if the interim program had continued. (*See* 743 F. Supp. at 1454, Petition App. 66a-68a). The Cities contend that WNG was motivated by a desire to prevent transportation because its profits were higher for sales than for transportation, and that WNG wanted to coerce favorable contracts from its customers by refusing transportation until they agreed to new contracts. The Cities describe these factors in combination as the "intent to use [WNG's] monopoly power to exclude competitors so it could limit its losses and make more profitable sales." (Petition at 21). That argument is faulty as a matter of law.

First, contrary to the Cities' assertion, WNG's profitability was not dependent on its making sales. The undisputed evidence in the district court shows that, since the mid-1970s, federal regulation of WNG and other pipelines has precluded pipelines from charging a "mark-up" or profit margin on the gas cost component of gas sales, and instead requires those costs to be passed through dollar-for-dollar. 18 C.F.R. § 154.302(j). *Cf. State of Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199 (1990). Any "profit" is provided to WNG in the form of a regulated return on its rate base, *i.e.* its investment in facilities to provide service. But the required facilities on which the return is calculated is the same whether the gas moving on the system is transportation gas or sales gas. Thus, whether WNG provides firm transportation or sales, its regulated "profit" is the same, and the Cities presented no contrary evidence.

Similarly, there is insufficient evidence in the record to overturn summary judgment against the Cities' claim that WNG was motivated by a desire to extract new contracts from the Cities with onerous terms. Every WNG official to testify on the issue stated unequivocally that but for the take-or-pay exposure WNG would face by continuing the interim program, open-access never would have been suspended. In contrast, the only evidence the Cities presented consisted of affidavits of a couple of city

officials stating their impression that they felt coerced into signing new contracts. The uncontradicted evidence, however, is that WNG never asked or required the Cities to execute new sales service agreements. Indeed, just the opposite was true. On a number of occasions WNG informed the Cities that under the permanent open-access program they could have whatever service they desired.[13] Therefore, any contention that WNG was motivated by a desire to foist burdensome contracts on the Cities is wholly without any basis in the record, leaving take-or-pay exposure as the only relevant business justification.[14]

Focusing only on the motivation to avoid take-or-pay exposure, the Cities attempt to portray that as a pure profit motivation. (Petition at 22, ". . . just another way of saying WNG wanted to use its monopoly power to reduce its losses or make more profits"). This they say is "the promotion of self interest alone" which they equate to the justification rejected in *Otter Tail*. *Id.* But clearly it is much more than that. In *Otter Tail*, the defendant was concerned only with making sales instead of the plaintiff. Here, WNG was unconcerned whether it made the sale directly or whether the Cities made the sale using gas transported on WNG's system—either way WNG's profits are the same. Instead, WNG's clear motivation

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[13] The Cities presented an identical "coercion" argument to the FERC, which was rejected. *Williams Natural Gas Co.*, 44 F.E.R.C. (CCH) ¶ 61,009 (1988). The finding of no coercion was not appealed, thereby precluding the Cities from further asserting the claim here. *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336-37 (1958).

[14] The court of appeals did "state" that WNG earned more profit on sales than transportation, and that WNG wanted to, and did, execute new sales service contracts with the Cities, but the district court found neither. (*See* 955 F.2d 647-48, 655, Petition App. at 6a, 22a). Both of those court of appeals' statements are simply not supported in the record, and the Cities do not even attempt to claim they executed new sales service agreements. Those errors, however, inured to the benefit of the Cities under their theory since they argue it makes WNG's conduct more egregious. When the actual facts about WNG's motivations are brought out, the Cities' arguments are even less worthy of consideration.

was to avoid millions of dollars in contract liabilities to third parties.

This Court has stated that "a company which possesses monopoly power and which refuses to . . . deal with a competitor in some manner does not violate Section 2 if valid business reasons exist for that refusal." *Aspen*, 472 U.S. at 597. "No matter how essential a monopolist's resources might be, he is never obligated to sacrifice legitimate business objectives." P. Areeda, H. Hovenkamp, *Antitrust Law* ¶ 736.2f (1991 Supp.). In the Statement of the Case above, WNG outlined the complex and ever-changing regulatory environment with which it has had to contend for the past several years, including the ever-present take-or-pay "sword poised next to [WNG's] corporate throat." *State of Illinois v. Panhandle Eastern Pipeline Co.*, 603 F. Supp. 786, 790 (C.D. Ill. 1985) ("*Panhandle I*"). Nevertheless, despite facing what the *Panhandle* court later described as a "business equation [which] takes on all the appearances of a classic type A heart attack producer for those called upon to make the corporate decisions," *State of Illinois v. Panhandle Eastern Pipe Line Co.*, 730 F. Supp. 826, 918 (C.D. Ill. 1990) ("*Panhandle II*"), WNG forged ahead in the difficult process of becoming an open-access transporter under a rational and comprehensive plan.

While waiting for approval of that plan, WNG also initiated an interim open-access program under the self-implementing transportation provisions of NGPA § 311. During the interim program, WNG's take-or-pay exposure continued to mount, though WNG was able to maintain the program during June and July of 1987 by obtaining temporary take-or-pay waivers from its principal supplier. Finally, on August 1, 1987, when additional take-or-pay waivers were no longer available, WNG suspended the interim transportation program until FERC approved the RS&A and its provisions enabling WNG to responsibly manage take-or-pay obligations. FERC finally approved the permanent open-access plan under an NGA § 7 certificate on July 5, 1988, and the open-access tariff

on July 19, 1988. WNG began open-access operations the very next day on FERC-approved terms.

Under no stretch of the language could this conduct be described as "willful maintenance of monopoly power." On the contrary, WNG's actions were always directed toward relinquishing whatever market power in sales of natural gas it might have had by allowing competitors to use its system to do business with WNG's historical sales customers—a decidedly pro-competitive act. *See Olympia Equipment Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370 (7th Cir. 1986), *cert. denied*, 480 U.S. 934 (1987). As Professor Areeda has observed, "One surely cannot monopolize a market by withdrawing from it." P. Areeda, H. Hovenkamp, *Antitrust Law* ¶ 736.1g (1991 Supp.). WNG was not obliged to commit corporate suicide in the meantime merely because the Cities (eight of the hundreds of communities served by WNG's system and the numerous parties participating in the RS&A proceeding at the FERC) were dissatisfied with the speed of the regulatory process.

The Cities conspicuously avoid all reference in their petition to the series of decisions in the virtually parallel litigation between the State of Illinois and Panhandle Eastern Pipe Line Company, but much can be learned from those decisions, particularly the Seventh Circuit's affirmation of judgment for Panhandle. *State of Illinois v. Panhandle Eastern Pipe Line Co.*, 935 F.2d 1469 (7th Cir. 1991), *cert. denied*, —— U.S. —— (1992). In that decision, the court of appeals succinctly stated the principles which properly guided the lower courts here in their decisions:

> Monopolists needn't acquiesce to every demand placed upon them by competitors or customers; a monopolist's duties are negative—to refrain from anticompetitive conduct—rather than affirmative—to promote competition. Just as the monopolist has no duty to deter the sale of its own equipment by promoting that of a competitor, so too *it has no duty to incur contractual liability itself* by excusing its customers from their contractual obligations.

Id. at 1484 (citations omitted, emphasis added). The same is true here. The antitrust laws do not require WNG to rack up millions in take-or-pay contractual liability simply so the Cities can earn higher profits sooner by purchasing lower cost gas and reselling it to their captive customers.

To be sure, this case "tells the story of an industry in turmoil, with almost nobody happy about their situation at any given time," *Panhandle II*, 730 F. Supp. at 910, but that is insufficient to impose treble-damage antitrust liability on WNG when its actions were not only reasonable reactions to the ever-changing market and regulatory instability, but also directed to the long-term, procompetitive goal of permanent open-access on a reasonable basis. The court of appeals and the district court were entirely correct to find that WNG's actions were motivated by perfectly legitimate business reasons, and those decisions do not conflict with decisions of this or any other court. Hence review by this Court is not warranted and the Cities' petition should be denied.

B. Six of the Cities Lacked Standing to Bring Claims Under § 2 for Some or All of the "Closed" Period

Three of the Cities were obligated by contract to purchase their full requirements of natural gas from WNG throughout the entire period during which the interim open-access program was suspended, and three others were similarly obligated by contract for about three quarters of that time. (*See* 1990-91 Trade Cas. ¶ 68,967 at 63,196, Petition App. 95a-96a). All of these contracts were expressly approved by the FPC and the FERC and were incorporated into WNG's tariff, and each expressly incorporated the tariff into the contract. The district court held, as a matter of law, that as a result of these contracts, the Cities had suffered no legally cognizable injury from WNG's actions, and therefore had no standing to bring § 2 claims in this litigation. (*See* 1990-91 Trade Cas. ¶ 68,967 at 63,203, Petition App. 116a). The Tenth Circuit affirmed that holding, albeit on somewhat different grounds. (*See* 955 F.2d at 653, Petition App. 18a).

The Cities now claim that those holdings conflict with this Court's decision in *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519 (1983), because they fail to "balance" a series of factors relating to standing identified in that decision. (Petition at 25). The Cities argument, however, greatly misperceives the holding in *Associated General Contractors*, and wholly misses the point of the standing question as WNG raised it on summary judgment.

Contrary to the Cities' assertion, *Associated General Contractors* did not identify a series of factors to be weighed in assessing standing, but rather identified several factors which might preclude a plaintiff from having standing even though it had suffered an injury connected to the unlawful conduct. *Id.* at 537 ("previously decided cases identify factors that circumscribe and guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances"). In that case, the Court focused on "the nature of the plaintiff's alleged injury," and found it to be outside the scope of the antitrust law. *Id.* at 538-39.

The nature of the injury the Cities claim here is the inability to purchase gas from someone other than WNG, or stated otherwise, the inability to breach their full-requirements contracts with WNG and violate the full-requirements provision of WNG's FERC-approved sales tariff. Clearly that is not a legally cognizable injury at all. Long ago, this Court noted that the word "injured" as used in Clayton Act § 4 "implies violation of a legal right." *Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156 (1922); *see also Maltz v. Sax*, 134 F.2d 2, 4 (7th Cir.), *cert. denied*, 319 U.S. 772 (1943) (Plaintiff had no legal right to manufacture illegal gambling device, therefore it suffered no cognizable injury under Clayton Act § 4 by conspiracy to exclude it from that business).

In *Keogh*, the plaintiff complained of having to pay higher rail shipping rates as a result of the defendants' conspiracy. However, the rates had been approved by the

Interstate Commerce Commission ("ICC"), and the Court held that plaintiff's only legal right was to a rate properly established by the ICC. Therefore, plaintiff had not suffered any "injury" under § 4 by paying the ICC-set rate, notwithstanding the defendants' conspiracy. *Keogh*, 260 U.S. at 163-64. *See also Panhandle III*, 935 F.2d at 1485 ("Panhandle's G tariff customers, by contrast, were contractually obligated to purchase their gas requirements from Panhandle . . ."); *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. of America*, 885 F.2d 683, 694-95 (10th Cir. 1989), *cert. denied*, —— U.S. —— (1990) ("Natural did not use economic coercion in its attempt to monopolize. Rather, Natural took advantage of its contractual right"); *United States v. Pacific Gas & Elec. Co.*, 714 F. Supp. 1039, 1051 (N.D. Cal. 1989); *Admiral Theatre Corp. v. Paramount Film Dist. Corp.*, 140 F. Supp. 686, 698 (D. Neb. 1955).

The same principle applies here. The operation of WNG's rights under the full-requirements contracts, and the Cities' consequent temporary inability to obtain gas from third parties (except to the extent they could have purchased Order No. 451 gas), preclude the Cities from claiming antitrust injury in this case. While their contracts with WNG were in effect, the Cities had no legally protected interest in the purchase of gas from others. Rather, they were contractually obligated to purchase their entire requirements of gas from Order No. 451 gas sellers and/or from WNG. Without such a legal right to purchase third-party gas, the Cities have suffered no legally cognizable injury, antitrust or otherwise.

C. The Courts Below Properly Applied the Summary Judgment Standards Articulated by This Court In Assessing the Cities' Claims

In their final argument, the Cities contend that the lower courts failed to apply the proper standards for summary judgment to their claim of antitrust injury by failing to consider the evidence in the light most favorable to them. The only supposed facts they note that the lower courts supposedly failed to consider, however, is

that they presented evidence that WNG's price was higher than the price they paid during the interim program, and that they "explained" that they had to raise their own retail rates with the consequence of losing "customers, sales and profits." (Petition at 26). It is true that WNG's sales rate was higher than the price charged by the Cities' chosen alternative supplier during interim open-access, but that fact alone proves nothing. Areeda, Hovenkamp, *Antitrust Law* § 736.1g (1991 Supp.) ("it is generally assumed that an otherwise lawful monopolist does not violate the statute by charging a monopoly price").

Although the Cities have complained throughout this litigation that they will lose customers and sales because of WNG's actions, they have never presented any evidence of that, including in response to WNG's motions for summary judgment. Therefore, the courts below did not violate summary judgment standards by failing to consider that claim. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 320-21 (1986) (summary judgment required against "a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case . . .").

The Cities rely on this Court's recent decision in *Eastman Kodak Co. v. Image Technical Services, Inc.*, —— U.S. ——, 60 U.S.L.W. 4465 (1992), but their reliance is misplaced. The point of the Court's holding in *Kodak* is merely that decisions on summary judgment cannot be based on abstract economic theories without any evidentiary support in the record. Rather, summary judgment can be granted only after adequate time for discovery is permitted, and only when the actual evidence presented shows that there is no disputed issue of fact on a decisive issue and the movant is entitled to judgment as a matter of law. *Id.* at 4469-70.

The holding in *Kodak* does not represent a departure from this Court's prior decisions on summary judgment including *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*,

475 U.S. 574 (1986). The district court followed the principles of those decisions in this case, noting that extensive discovery was taken by both sides over a more than one-year period. (Petition App. at 40a, 70a, 92a). Both parties submitted a large volume of documentary and testimonial evidence in support of and opposition to four separate summary judgment motions. (*See* 1990-91 Trade Cas. ¶ 68,967 at 63,195, Petition App. 92a). The district judge thoughtfully considered that evidence and based his decision solely on the evidence rather than economic theory. Thus, the district court decisions, and the court of appeals decision affirming them, are wholly consistent with *Kodak*, as well as *Celotex* and *Matsushita*, and no review in this Court is necessary.

IV. THE ISSUES RAISED IN THIS CASE ARE NOT SUFFICIENTLY IMPORTANT TO MERIT THIS COURT'S ATTENTION

The actions about which the Cities complain in this litigation arise out of an industry in transition. In essence, the Cities argue that WNG moved too slowly in making the transition to become a permanent transporter of natural gas, and that in the process WNG attempted to garner too much power unto itself. It is not disputed, however, that whether or not the Cities are right, the transition was completed long ago. (*See* Petition at 10, acknowledging preliminary injunction moot in 1988). WNG has been an open-access transporter for over four years. In fact, all major interstate pipelines are now open-access transporters, and most have been for several years. 1990 FERC Annual Report at p.4. The FERC initiatives instituting open-access have been completed, and the post-implementation adjustments to the regulations and the pipelines' operations programs have been made.[15] Even

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[15] The FERC did recently promulgate its Order No. 636, 57 Fed. Reg. 13,267 (1992), which further "unbundles" the gas sales, transportation, and storage services interstate pipelines continue to provide. Nevertheless, the conversion from merchant-only sales service to open-access transportation was complete years ago.

the FERC and the Court of Appeals for the District of Columbia Circuit have acknowledged that interstate pipelines no longer possess "market power over the marketing or sales of natural gas . . ." *Tenneco Gas v. FERC*, —— F.2d ——, Slip Op. at 22 (D.C. Cir. July 21, 1992).

In short, the conduct at the heart of this litigation was the result of historical and regulatory events which have now run their course and are not likely to be repeated. As far as WNG is aware, the only other antitrust action arising out of the pipeline industry's transition has been finally adjudicated and this Court has denied certiorari. *State of Illinois v. Panhandle Eastern Pipe Line Co.*, 935 F.2d 1469 (7th Cir. 1991), *cert. denied*, —— U.S. —— (1992). Further adjudication in this case will have no bearing on any other parties' conduct, and in a substantial number of cases the statute of limitations on any antitrust claim which might have been brought has expired. Clayton Act § 4B, 15 U.S.C. § 15b. Any decision by the Court in this case will affect only the Cities and WNG and will have no broader impact on the public at large, making this case inappropriate for review on certiorari. *See, e.g., NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498, 502 (1951); *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923) ("it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties . . ."). Therefore, the Cities' petition should be denied.

CONCLUSION

For all the foregoing reasons, WNG respectfully requests this Court to deny the Cities' petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit.

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